Supreme Court, U.S.
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No. 99-969

IN THE

Supreme Court of the United States

MISTICK PBT,

Petitioner,

v.

HOUSING AUTHORITY OF
THE CITY OF PITTSBURGH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS L.D. ASTORINO AND ASSOCIATES, LTD., LOUIS D. ASTORINO, DENNIS L. ASTORINO, PATRICK I. BRANCH AND BERNARD J. QUINN

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STATEMENT PURSUANT TO RULE 29.6

Respondent, L.D. Astorino and Associates, Ltd., is a wholly owned subsidiary of LDA-LDA Companies. No publicly held company owns 10% or more of the stock of the respondent or its parent.

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STATEMENT OF THE CASE

I. The 1991 State Court Action

Petitioner, Mistick PBT ("Mistick") was the general contractor on two residential housing projects (collectively the "project") owned by Respondent, the Housing Authority of the City of Pittsburgh ("the HACP"). Respondents, Ernest E. Miller and David B. Washington are individual employees of the HACP. Respondent, L. D. Astorino and Associates, Ltd. ("Astorino") was the architect for the project. Respondents, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch and Bernard J. Quinn are individual employees of Astorino.

In July of 1991, Mistick filed a lawsuit against the HACP in the Court of Common Pleas of Allegheny County, Pennsylvania ("the State Court Action") to recover an alleged increase in the cost of performing the project as a result of a change in the specification for the product to be used as a lead based paint encapsulant from "Glid Wall" to another product known as "Zomat." This change from Glid Wall to Zomat also forms the subject of this action under the False Claims Act. (Joint Appendix, United States Court of Appeals for the Third Circuit ("JA") at A365-A372).

In October of 1994, three (3) years after the State Court Action was commenced, Mistick filed a motion in that action to file an amended complaint including a cause of action against Astorino for fraud. (JA at A174). In support of that motion, Mistick represented to the State Court that it had just, through the course of discovery over the past two months, discovered evidence of which it was previously unaware that would justify asserting a cause of action against

Astorino for fraud. This evidence, according to Mistick, demonstrated as follows:

> (1) that the HACP and Astorino acted in complete and willful disregard of facts in their possession in specifying the use of Glid Wall as a lead based paint encapsulant for the project;
>
> (2) that Astorino knew back in 1988 of warnings regarding the use of Glid Wall as a lead based paint encapsulant; and
>
> (3) that Dennis Astorino and Patrick Branch deliberately disregarded information from the manufacturer of Glid Wall in developing the specification to use Glid Wall as a lead base paint encapsulant.

(JA at A237; A834-A835).

Mistick specifically represented to the State Court that because of the "just recently" discovered evidence of the foregoing allegations, it could not have maintained a cause of action for fraud prior to that time. (JA at A834-A835). Mistick's motion to assert a cause of action against Astorino for fraud was denied by the State Court on or about December 6, 1994 because, among other things, Mistick's allegations against Astorino showed only that the HACP and Astorino failed to exercise reasonable care in preparing the specifications for the lead based paint abatement. (JA at A255-A257).

II. The 1995 Qui Tam Action

A. Background

Mistick commenced this qui tam action under the False Claims Act on November 20, 1995. Prior to that, Mistick asserts that it met with the United States and provided the information which allegedly supports the allegations in its qui tam Complaint. After reviewing Mistick's information, the United States declined to intervene in this matter. Since that time, Mistick has prosecuted this action on its own.

The Complaint which Mistick originally filed in the instant qui tam action in November, 1995 ("the original qui tam Complaint") made various allegations that the HACP and Astorino made false claims for payment or reimbursement for extra costs to the United States Department of Housing and Urban Development ("HUD"), which funded a portion of the project. The false claims, according to Mistick, were related to the change from Glid Wall to Zomat as a lead based paint encapsulant on the project. (JA at A013-A150).[1]

The HACP and Astorino each filed Motions to Dismiss the original qui tam Complaint, relying, in part, on the False Claims Act's jurisdictional bar. *See* 31 U.S.C. § 3730(e)(4). Both Defendants asserted that: (1) the original qui tam Complaint was based upon information which was previously publicly disclosed and of which Mistick admittedly first learned in the State Court Action; and (2) that Mistick was not the "original source" of such information. (JA at A161-A403).

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1. Astorino vehemently denies that it submitted any false claims to the United States or otherwise committed any type of fraud against any entity.

Mistick responded to the HACP's and Astorino's Motions to Dismiss by filing a First Amended Complaint ("amended qui tam Complaint") with attached Affidavits of David M. Priselac, Esquire, counsel for Mistick and Thomas Mistick, President, Treasurer and partial owner of Mistick. (JA at A405-A556). Unlike Mistick's representations to the State Court, the Affidavits state that, "Mistick came to believe by the Summer of 1990 that [Astorino and the HACP] in fact had known of the policy concerning Glid Wall all along . . ." (JA at A538; A549).

Astorino and the HACP filed Motions to Dismiss Mistick's amended qui tam Complaint, again relying, in part, on the False Claims Act's jurisdictional bar. *See* 31 U.S.C. § 3730(e)(4). Defendants asserted that: 1) the amended qui tam Complaint was based upon information which was previously publicly disclosed on at least two separate occasions, first in a response to a request under the Freedom of Information Act, 5 U.S.C. § 522, *et seq.*, ("FOIA") in October of 1993, and again in the State Court Action via discovery and various court filings. (JA at A615-A619; A761-A763).

B. The District Court's Decision

By a Memorandum Opinion and Order, dated March 26, 1997, the United States District Court for the Western District of Pennsylvania held that it lacked subject matter jurisdiction over Mistick's qui tam action under the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). Specifically, the District Court held that there was not only one, but two separate public disclosures of the allegations or transactions upon which the amended qui tam Complaint was based. The first public disclosure occurred when Mistick obtained the information on

which it had allegedly based its amended qui tam Complaint via a FOIA request in October of 1993. The second disclosure was in the State Court Action via discovery and various court filings. (Appendix C, at 79a-81a). In that regard, the District Court specifically determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia*, discovery in the prior state court action and its FOIA request." (Appendix C, at 81a).

The District Court also held that, even assuming Mistick performed its own investigation, it still was not an original source of the information upon which it based its qui tam Complaint because it had neither direct nor independent knowledge thereof. (Appendix C, at 84a). The District Court explained as follows:

> As recognized by the Third Circuit, "[t]he paradigmatic 'original source' is a whistleblowing insider." *Id.* at 1161. This covers "individuals who are close observers or otherwise involved in the fraudulent activity." *Id.* Under the facts of this case, Mistick clearly does not qualify as a "whistleblowing insider."

(Appendix C, at 83a).[2]

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2. In its Petition, Mistick asserts that, "as a matter of logic, virtually no person other than Mistick would have understood the context in which the [allegedly false] statements were made, known that the statements were false, or even looked for the statements in the first place." Petition for Writ of Certiorari at 4-5. Not only does this statement contravene the District Court's determination that Mistick, under the facts of this case, was not a close observer or otherwise involved in the fraudulent activity, but the record is also

(Cont'd)

Astorino and the HACP also asserted alternative grounds upon which to dismiss the amended qui tam Complaint under Fed. R. Civ. P. 12(b)(6). The District Court did not reach these issues in light of its dismissal of the amended qui tam Complaint under the False Claims Act's jurisdictional bar.

C. The Third Circuit's Decision

Mistick argued in its appeal to the Third Circuit Court of Appeals that the District Court erred by concluding that: (1) the information disclosed in response to the FOIA request was a "public disclosure" that would trigger the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4); (2) the State Court Action involved the same "allegations" or "transactions" as the instant qui tam action; and (3) Mistick was not an "original source" of the information upon which it based its amended qui tam Complaint. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 382 (3d Cir. 1999) (Appendix A, at 13a).

The majority of the three member panel of the Third Circuit Court of Appeals (the "Third Circuit"), affirmed the District Court and held that the response to the FOIA request was, in fact, a "public disclosure" sufficient to trigger the jurisdictional bar of the False Claims Act. *See id.* at 383

(Cont'd)
completely devoid of any evidence to support it. Rather, assuming, *arguendo*, that any false statements were made, then the persons who would have been in the best position to understand the context in which the allegedly false statements were made, known that the statements were false, or even looked for such statements would have been the true "whistleblowing insiders," i.e., employees of Astorino and/or the HACP.

(Appendix A, at 13a). In so holding, the Third Circuit relied, in part, on this Court's decision in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). In *GTE*, it was held that the disclosure of information pursuant to the FOIA constitutes a "public disclosure" within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1). *See Mistick*, 186 F.3d at 383 (citing *GTE*, 447 U.S. at 108-09). (Appendix A, at 13a-14a). The Third Circuit further held that the response to the FOIA request occurred within "one or more" of the contexts specified in 31 U.S.C. § 3730(e)(4)(A). Specifically, the Third Circuit held that the [FOIA] response constituted an "administrative . . . report," as well as an "administrative . . . investigation." *Mistick*, 186 F.3d at 383-384 (Appendix A, at 15a-18a).

The Third Circuit also rejected Mistick's "fall back" argument, "that the jurisdictional bar is not triggered, 'because the other essential element, the true state of facts, was not publicly disclosed within the meaning of that provision.' " *Id.* at 385 (Appendix A, at 19a). This argument was rejected primarily because counsel for Mistick conceded at oral argument before the Third Circuit Court of Appeals that all of the essential elements of the alleged qui tam fraud were publicly disclosed in the State Court Action. *See id.* (Appendix A, at 19a-20a).

The Third Circuit then addressed Mistick's only remaining argument that, "although all of the essential elements were revealed in either the FOIA response or in civil discovery, its qui tam action was not 'based on' those public disclosures." *Id.* (Appendix A, at 20a). To that end, Mistick argued that 'based upon,' as used in 31 U.S.C. § 3730(e)(4)(A), should be interpreted to mean "derived from," and, despite its representations to the State Court, its qui tam action was not "derived from," either the information obtained from the FOIA request or the State Court Action.

The Third Circuit rejected this argument as well, instead holding that, "a qui tam action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims." *Id.* at 388 (Appendix A, at 27a). The Third Circuit explained that Mistick's "derived from" interpretation of "based upon," violated the precept that a statute should be construed, if possible, so as not to render any of its terms superfluous. *See id.* at 386 (Appendix A, at 22a-23a). This is exactly what would happen to the "original source" exception to the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(B) under Mistick's "derived from" interpretation of "based upon." *See id.* (Appendix A, at 21a-23a).

Because the essential elements of Mistick's qui tam action were publicly disclosed and Mistick's qui tam action was "based upon" those disclosures, the Third Circuit concluded that Mistick's action was jurisdictionally barred unless it could be saved by the "original source" exception, § 3730(e)(4)(B). *See id.* at 388 (Appendix A, at 26a-27a). The Third Circuit concluded that Mistick was not an original source of the information upon which it based its qui tam Complaint because it had neither direct nor independent knowledge of the allegedly fraudulent statements of the HACP and Astorino. *See id.* at 389 (Appendix A, at 28a). Accordingly, the Third Circuit affirmed the decision of the District Court granting the HACP's and Astorino's Motions to Dismiss for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI TO REVIEW THE ISSUE OF WHETHER A DOCUMENT PRODUCED VIA THE FREEDOM OF INFORMATION ACT IS PUBLICLY DISCLOSED UNDER THE FALSE CLAIMS ACT.

The first issue addressed by the Third Circuit, and which is also raised in Mistick's Petition, is whether a FOIA response is a "public disclosure" triggering the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The Third Circuit, following precedent, held that a disclosure of information in response to a FOIA request is a "public disclosure" triggering the jurisdictional bar of the False Claims Act. *See id.* at 382-385. (Appendix A, 13a-18a). This decision is in accord with every other Circuit that has addressed the issue. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *cert. granted, Hughes Aircraft Co. v. United States ex rel. Schumer*, 519 U.S. 926 (1996), *vacated on other grounds*, 520 U.S. 939 (1997) (documents produced in response to a FOIA request are "publicly disclosed" for purposes of the qui tam statute); *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717 (6th Cir. 1999) (documents received pursuant to a FOIA request are considered to be "publicly disclosed" as contemplated by the jurisdictional bar section of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A)).

Petitioner has had ample opportunity to proffer some argument that the "public disclosure" issue meets one of the

tests set forth in Rule 10 of the Supreme Court Rules governing review on certiorari, but has failed to even make such an attempt. *See* Petition for Writ of Certiorari at 24-26. Simply put, Petitioner's Writ focuses on the merits of the argument rather than focusing on the issue at hand: The reasons why this Court should grant certiorari. Indeed, there are no compelling reasons for this Court to review the matter of whether the disclosure of information in response to a FOIA request is a "public disclosure" triggering the jurisdictional bar of the False Claims Act.

II.

THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI TO REVIEW THE ISSUE OF WHETHER THE PHRASE "BASED UPON" IN THE JURISDICTIONAL BAR OF THE FALSE CLAIMS ACT SHOULD BE INTERPRETED TO MEAN "SUPPORTED BY" OR "DERIVED FROM."

Mistick's Petition also requests this Court to grant certiorari to review the issue of whether the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A), should be interpreted to mean "supported by" or "derived from." Notably, this Court has refused to grant certiorari on this issue in the past. *See, e.g., United States ex rel. Biddle v. Board of Trustees,* 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); and *United States ex rel. Findley v. FPC - Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997), *cert denied,* 522 U.S. 865 (1997). Mistick's

Petition in this case fails to set forth any novel or compelling reasons as to why this Court should now grant certiorari.[3]

A. No Conflict Exists Among The Circuits That Requires Resolution At This Time.

Mistick argues that certiorari is appropriate because there is a split in the Circuits regarding the interpretation of the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A). To support this argument, Mistick cites the following cases which interpret "based upon" in 31 U.S.C. § 3730(e)(4)(A) to mean "derived from," contrary to eight other circuits which have interpreted it to mean "supported by": *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994); *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999); and *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). These cases, however, present a conflict far less acute than what Mistick's Petition suggests and which does not require resolution at this time.

Initially, the First Circuit's decision in *United States ex rel. LeBlanc v. Raytheon Co., Inc., supra*, cannot be taken into account in establishing a split in the Circuits because the Court

3. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, 120 S. Ct. 523 (1999), the parties were directed, "to file supplemental briefs addressing the following question: 'Does a private person have standing under Article III to litigate claims of fraud upon the government?' " Accordingly, if this Court decides in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, that a private person does not have standing to bring an action under Article III to litigate claims of fraud upon the government, then the issues raised in Mistick's Petition will be rendered moot. Mistick's Petition should be denied on this basis alone.

did not write an opinion. Rather, the Court summarily affirmed the district court, without any discussion. *See id.* Moreover, neither the Seventh Circuit in *United States v. Bank of Farmington, supra,* nor the district court in *LeBlanc, supra,* found it necessary to even make a decision as to whether "based upon" should be interpreted to mean "supported by," or "derived from." Instead, in both of those cases, the courts ultimately stated that under either interpretation, the qui tam complaint was "based upon" the publicly disclosed information. *Bank of Farmington,* 166 F.3d at 867; *LeBlanc v. Raytheon Co., Inc.*, 874 F. Supp. 35, 40 (D. Mass. 1995), *aff'd,* 62 F.3d 1411 (1st Cir. 1995), *cert. denied,* 516 U.S. 1140 (1996).

Most significant, however, is the fact that none of the three cases cited by Mistick to establish a split in the Circuits even acknowledge, let alone address, the issue of whether interpreting "based upon" to mean "derived from," in the context of 31 U.S.C. § 3730(e)(4)(A) renders the "original source" exception largely superfluous. On the other hand, all eight circuits that have addressed this issue to date, including the Third Circuit in this matter, have interpreted "based upon" in § 3730(e)(4)(A) to mean "supported by," as opposed to Mistick's "derived from" interpretation. *See United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992); *Mistick*, 186 F.3d at 387; *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *McKenzie*, 123 F.3d at 940; *Biddle*, 161 F.3d at 537; *United States Ex Rel. v. M. K. Ferguson*, 99 F.3d 1538 (10th Cir. 1996); *Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994); *Findley*, 105 F.3d at 682-83.

1. The Third Circuit Properly Rejected Mistick's "Derived From" Interpretation of "Based Upon" in 31 U.S.C. § 3730(e)(4)(A).

One of the primary reasons all of the foregoing Circuits, including the Third Circuit, have been compelled to reject Mistick's "derived from" interpretation of "*based upon*" in 31 U.S.C. § 3730(e)(4)(A) and adopt the "supported by" interpretation is because the "derived from" interpretation renders the original source provision set forth in 31 U.S.C. §§ 3730(e)(4)(A) and (B) redundant and largely superfluous. Thus, "*based upon*" cannot be interpreted to mean "derived from" as Mistick argues because such an interpretation would directly violate this Court's maxim of statutory construction that a statute should not be interpreted so as to render superfluous other provisions in the same enactment. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877 (1991) (noting that, "our cases consistently have expressed, 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.' ")

The District of Columbia Circuit Court of Appeals aptly summarized this conclusion as follows:

> Why, one may ask, assuming the Fourth Circuit test of "based upon" as meaning "derived from," would Congress provide an exception in the case of a relator who has actually derived his complaint from public information, that allows him to demonstrate that he already provided his independently obtained knowledge to the government before he filed suit? Such a test strains the meaning of the word independent to encompass a relator who, after reading about a fraudulent transaction in The Washington Post or The Washington Times,

> conducts an "independent" investigation to obtain direct knowledge of the fraud and beats the government to the courthouse. Such relator could fulfill the "original source" governmental notice requirement by delivering a courtesy copy of a proposed complaint outlining the same information that is in the public domain to the Attorney General the day before filing the official Complaint under seal and serving it on the Attorney General. Thus, under the Fourth Circuit's interpretation, the primary "based upon" test swallows the original source exception whole. Using "based upon" as a proxy for whether the relator's complaint merely parrots what is already in the public domain, on the other hand, leads logically to a subsidiary inquiry into whether the relator had obtained the information in his complaint independently prior to the disclosure and so is an "original source."

Findley, 105 F.3d at 683.[4]

Mistick's Petition incorrectly asserts that "[b]y interpreting the phrase 'based upon' in § 3730(e)(4)(A) to

4. Mistick's "derived from" interpretation of "based upon" in 31 U.S.C. § 3730(e)(4)(A) would also allow a relator to avoid the second requirement of the "original source" provision that the information upon which the qui tam complaint is based be provided to the United States Government prior to bringing the action. *See Salcido, Screening Out Unworthy Whistleblower Actions: A Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB CONTRACTS L.J. 237 (1995) (stating that: "[the "derived from"] construction would in effect strike the statutory requirement that the relator 'voluntarily' provide his evidence to the Government prior to filing because the relator would only need to prove that he had information 'independent' of the public disclosure and therefore his complaint is not 'based upon' the public disclosure.")

mean 'substantially similar to,' or 'supported by,' rather than according to its admitted plain meaning of 'derived from,' the panel majority interprets § 3730(e)(4)(A) as a bar to meritorious *qui tam* suits generated from the relator's original and independent knowledge." Petition for Writ of Certiorari at 9. This is clearly not the effect of the Third Circuit's holding. Most significantly, it fails to recognize that under the Third Circuit's holding, a relator may still bring an action under the False Claims Act, even if it is "based upon" publicly disclosed information, if the relator is an original source, i.e., has "direct and independent knowledge of such information." *Mistick*, 186 F.3d at 389 (Appendix A, at 27a). However, the Third Circuit, as well as the District Court, held that Mistick did not have direct and independent knowledge of the information upon which it based its qui tam Complaint. *See id.* at 389 (Appendix A, at 28a; Appendix C, at 85a).

In conclusion, the Third Circuit correctly held in this case that "based upon" in § 3730(e)(4)(A) must be interpreted to mean "supported by." This holding is consistent with all the Circuits that have addressed the issue of whether Mistick's "derived from" interpretation renders the "original source" exception to the jurisdictional bar of the False Claims Act superfluous. As such, there is no conflict among the Circuits that would require resolution at this time.

2. Mistick's Attempt To Create A Scenario In Which Its "Derived From" Interpretation Would Not Render The "Original Source" Exception To The Jurisdictional Bar Of The False Claims Act Superfluous Must Fail.

Mistick goes to great lengths in an attempt to create two scenarios in which its "derived from" interpretation of "based upon" would not render the "original source" exception to the False Claims Act's jurisdictional bar superfluous. Significantly, not a single Circuit Court has embraced either of these scenarios.

Under the first scenario, Mistick suggests that, "the 'original source' provision may be a mere safe harbor, useful whenever a relator could more easily prove itself an 'original source' than disprove a causal link between the public disclosures and the qui tam action." Petition for Writ of Certiorari at 22. As pointed out by the Third Circuit, however, even if there were no "original source" exception, a relator could still prove that his information was not derived from a public disclosure by showing that he was an original source of the information. Thus, this argument fails to explain why Congress would have adopted the "original source" exception if the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A) meant "derived from." *Mistick*, 186 F.3d at 387. (Appendix A, at 23a).

Mistick also suggests that, "[w]hen it is realized that the phrase 'based upon' in § 3730(e)(4)(A) could mean 'actually derived in part from' the supposed superfluousness of § 3730(e)(4)(B)'s original source provision vanishes." Petition for Writ of Certiorari at 23. Significantly, this explanation requires an even greater deviation from the plain language of 31 U.S.C. § 3730(a)(4)(A) than what Mistick

accuses the Third Circuit of in holding that "based upon" in § 3730(a)(4)(A) must be interpreted to mean "supported by," as opposed to "derived from." Indeed, neither Mistick nor, as pointed out by the Third Circuit, Judge Becker in his dissent, attempts to explain how this interpretation can be made to fit the language of 31 U.S.C. §§ 3730(e)(4)(A) and (B). *See id.* (Appendix A, at 23a).

In any event, even taking into consideration Mistick's scenarios, the fact remains that a "derived from" interpretation of the phrase "based upon" renders the original source exception in 31 U.S.C. § 3730(e)(4)(A) and § 3730(e)(4)(B) largely superfluous. In light of the foregoing, Mistick's attempt to create a scenario in which its "derived from" interpretation of "based upon" does not render the original source exception superfluous must fail and does not present a meritorious reason to grant its Petition.

B. The Facts Of This Case Do Not Warrant A Grant Of Certiorari.

Mistick's Petition is founded, in large part, on its position that "based upon" in 31 U.S.C. § 3730(e)(4)(A) should be interpreted to mean "derived from," as opposed to "supported by." *See* Petition for Writ of Certiorari at 9. However, Mistick's Petition overlooks the fact that the District Court already determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia,* discovery in the prior state court action and the FOIA." (Appendix C, at 81a). In fact, the Third Circuit also held that Mistick learned of the

allegedly fraudulent statements through a public disclosure. *See Mistick*, 186 F.3d at 389. (Appendix A, at 28a).[5]

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5. Mistick's Petition erroneously asserts that, "[u]nder Chief Judge Becker's view, the action was not barred because, among other reasons, it was not 'derived from' publicly disclosed information." Petition for Writ of Certiorari at 6. Contrary to Mistick's assertions, Judge Becker stated in his dissent that he would have remanded the case to the District Court to determine whether the allegations in Mistick's Complaint were "derived from" the public disclosures. *Mistick*, 186 F.3d at 402 (Appendix A, at 61a). However, Judge Becker failed to recognize that the District Court had already determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia*, discovery in the prior state court action and its FOIA request." (Appendix C, at 81a).

Mistick's Petition also erroneously asserts that,

> the panel majority recognized that Mistick knew both the true and misrepresented facts independently, well before publication of the same in the Mistick State Action. Mistick's original and independent knowledge was gained, as to the true set of facts, primarily as a result of Mistick's performance of its general contracting work on the Bedford and Addison projects.

Petition for Writ of Certiorari at 7. Indeed, absolutely nowhere in its majority opinion does the Third Circuit determine, as a matter of fact, that Mistick gained its knowledge of the "true set of facts," as a result of its performance of its general contracting work on the project. To the contrary, the Third Circuit utilized such phrases as, "[a]ccording to Mistick's Complaint," or "[a]ccording to the affidavit of D. Thomas Mistick," to qualify any statements regarding what Mistick terms, "the true set of facts." *See Mistick*, 186 F.3d at 379 (Appendix A, at 4a-6a).

Accordingly, the result in this matter, i.e., a finding that Mistick's action was "based upon" a public disclosure would not change regardless of whether the "based upon" language in 31 U.S.C. § 3730(e)(4)(A) is interpreted to mean "derived from" or "supported by." Any resolution of the "derived from" versus "supported by" issue should, therefore, await a case in which it is determined that the relator, unlike Mistick in this case, obtained the information upon which the qui tam action was based independently of any public disclosure, yet was still precluded from bringing the action under the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4).

C. If, As Mistick Argues, The Circuit Courts' Interpretation Of The Jurisdictional Bar Is Inconsistent With Legislative Intent, Then Congress Can And Will Amend The Statute.

In support of its Petition, Mistick relies, to a large extent, on a letter authored by Senator Charles E. Grassley and Congressman Howard L. Berman to Janet Reno, Attorney General, 145 Cong. Rec. E1540-01, E1546-01 (July 14, 1999) (the "Grassley/Berman letter"), thirteen years after the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4) was last amended in 1986. Mistick's reliance on the Grassley/Berman letter to bolster its Petition, however, is of no moment. This Court has consistently held that, "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage . . . Such statements 'represent only the personal views of these legislators, since the statements were (made) after passage of the Act.' " *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 132 (1974) (citations omitted). Indeed, "[T]he views of a legislature concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed . . . arguments based on

subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia J., concurring in part). As such, the opinions asserted in the Grassley/Berman letter should not be considered for the purposes of interpreting the jurisdictional bar of the False Claims Act.[6]

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6. Notwithstanding the representations set forth in the Grassley/Berman letter thirteen (13) years after the 1986 amendments to the False Claims Act, the Third Circuit noted that its decision in this case was, in fact, consistent with the description of the amendments which Senator Grassley and Representative Berman offered in 1986 and explained as follows:

> Although we do not rely on the legislative history of the qui tam provision in reaching this conclusion, *see Stinson*, 944 F.2d at 1154, it is interesting that sponsors of the 1986 False Claim Act Amendments described it as having a meaning consistent with our holding. Senator Grassley, one of original Senate sponsors, in speaking of the technical and clarifying amendments that introduced the present language in § 3730(e)(4)(A), stated:
>
> [J]urisdiction for qui tam actions based on information that has been publicly disclosed will be limited to those people who were "original sources" of the information. . . . 132 Cong. Rec. S11238-04 (Aug. 11, 1986) (emphasis added). Similarly, Representative Berman, one of the sponsors of the House bill, submitted "legislative history" that stated in relevant part:
>
> Before the relevant information regarding fraud is publicly disclosed through various government hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long

(Cont'd)

Significantly, however, the Grassley/Berman letter is relevant to the instant matter to the extent that it demonstrates Congress' knowledge of the Circuit Courts' interpretation of the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). If, as Mistick argues, Congress is discontented with the past and current interpretation of the jurisdictional bar which the Circuit Courts have been compelled to apply, then Congress can and will amend the statute. In the meantime, the courts are bound to follow the tenets of statutory construction which this Court has established in interpreting the jurisdictional bar.

D. Mistick's Argument That The Third Circuit's Decision Conflicts With Decisions Of This Court Is Incorrect.

Mistick's Petition asserts that the Third Circuit's decision in this case, and the decision of at least seven other Circuit Courts, is inconsistent with decisions of this Court. In making such an argument, Mistick cites to general principles of statutory construction opposite to its position. Mistick fails, however, to address the basic tenets of this Court which compel the Circuit Courts to interpret "based upon" in 31 U.S.C. § 3730(e)(4)(A) to mean "supported by," and not "derived from."

Initially, Mistick cites this Court's decisions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) and *United States v. Neifert-White Co.*, 390 U.S. 228 (1968) for the

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(Cont'd)

> as it is filed before the government filed an action based upon the same information. Once, the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action. 132 Cong. Rec. H9382-03 (Oct. 7, 1986) (emphasis added).

Mistick, 186 F.3d at 388, n.9 (Appendix A, at 26a-27a).

proposition that "[t]his Court has warned against unduly restrictive interpretations of the *qui tam* provisions of the Act, in light of the clear historical Congressional intent to employ such actions as part of the United States' anti-fraud efforts." Petition for Writ of Certiorari at 18-19. Significantly, unlike the instant matter which centers on the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A), of the current version of the False Claims Act, *Marcus* and *Neifert-White Co.*, involve a prior version of the False Claims Act and do not involve the issue of the Federal Courts' subject matter jurisdiction.

Mistick's Petition also asserts that the Third Circuit's decision in this matter is inconsistent with this Court's decisions holding that a statute must be interpreted according to the plain meaning of the terms chosen by Congress, notwithstanding the fact that a statute is poorly or inartfully drafted. In support of this argument, Mistick cites the following cases: *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. James*, 478 U.S. 597, 604 (1986); *Rubin v. United States*, 449 U.S. 424, 429-430 (1981); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989); *Office of Workers' Compensation Program v. Rasmussen*, 440 U.S. 29, 45-47 (1979); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Mistick does not, however, acknowledge any of the decisions of this Court which unequivocally express, "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552,

562 (1990). This basic tenet of statutory construction must be invoked, even if the plain language of a statute is unambiguous. *See, e.g., United States v. Correl*, 389 U.S. 299 (1967).

Moreover, except for one, none of the cases cited by Mistick involves the issue of whether a particular interpretation of a statute renders another part of the statute superfluous. Significantly, in the only case wherein the issue was raised, *Connecticut Nat'l Bank v. Germain, supra*, this Court reaffirmed the rule that, "a court should disfavor interpretations of statutes that render language superfluous." 503 U.S. at 253. In that case, however, the Court determined that no part of the statute was rendered superfluous under the plain language of the statute, unlike in this case where Mistick's "derived from" interpretation of "based upon" renders the "original source" exception superfluous. Thus, the Third Circuit's decision in this matter is entirely consistent with the weight of precedent and the decisions of this Court.

E. The Decisions Of This Court Addressing The Phrase "Based Upon" In Other Federal Law Contexts Supports The Third Circuit's Decision In This Case.

Mistick's Petition asserts that this Court, in other opinions, has favored the type of "derived from" meaning rejected by the Third Circuit and in support of this argument cites *United States v. Wade*, 388 U.S. 218, 240 (1967) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). *See* Petition for Writ of Certiorari at 20-21. Neither case, however, supports Mistick's position. The meaning of the phrase "based upon" was not at issue in *Wade*. Furthermore, in *Saudi Arabia v. Nelson*, this Court's definition of the phrase "based

upon" actually supports the Third Circuit's interpretation. In *Saudi Arabia*, this Court held that, "the phrase [based upon] is read most naturally to mean those elements of a claim that, if proven, would entitle Plaintiff to relief under his theory of the case." *Saudi Arabia*, 507 U.S. at 357. Contrary to Mistick's assertion, this supports, and in fact, is substantially similar to the Third Circuit's holding that, "a qui tam action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims." *Mistick*, 186 F.3d at 388 (Appendix A, at 27a).

III.

THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI REGARDING THE THIRD CIRCUIT'S HOLDING THAT MISTICK IS NOT AN "ORIGINAL SOURCE" OF THE INFORMATION UPON WHICH IT BASED ITS COMPLAINT.

Mistick's Petition frames the third issue upon which it seeks a Writ of Certiorari as, "[w]hether a person is disqualified from being an 'original source' under 31 U.S.C. § 3730(e)(4)(B) when that person's *qui tam* suit is 'based upon' fraudulent transactions that were publicly disclosed as a result of that person's efforts." Petition for Writ of Certiorari at 1. The issue, however, as framed by Mistick, mischaracterizes what the Third Circuit actually held with respect to the "original source" exception.

Relying upon its prior holding in *United States ex rel. Stinson, Lyons, Gerlin and Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1990), the Third

Circuit held that, "[a] relator who would have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of original source." *Mistick*, 186 F.3d at 389 (Appendix A, at 28a). The Third Circuit then explained that Mistick was,

> not an "original source" because it did not have "direct and independent knowledge" of the most critical element of its claim, viz., that the Authority had made the alleged misrepresentations to HUD regarding its knowledge about Glidwall's unsuitability as a lead based paint encapsulant at the time of the original specification.

Id. at 388-389 (Appendix A, at 28a).

Contrary to the assertions in Mistick's Petition, the Third Circuit's holding that Mistick is not an "original source" is entirely consistent with its prior holding in *Stinson*. It also does not, as Mistick argues, somehow render either paragraph (A) or (B) of 31 U.S.C. § 3730(a)(4) superfluous. The Third Circuit simply recognized, and common sense dictates, that a person who would not have learned of information absent a public disclosure, does not have independent knowledge thereof. *See id.* (Appendix A, at 27a-28a).

Mistick's petition also incorrectly states that in *United States ex rel. Newsham v. Lockheed Missles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), the Ninth Circuit "specifically" held that a relator still qualifies as an original source when the relator itself caused the supposed "public disclosure." Petition for Writ of Certiorari at 28. To the contrary, in *Newsham*, the Ninth Circuit held, like the Third Circuit in *Stinson* and this case, that an "original source" must have both direct and independent

knowledge of the information on which the allegations in the qui tam Complaint are based. The Ninth Circuit, however, imposed an additional requirement that the relator also have, "a hand in the public disclosure of the allegations." *Newsham*, 190 F.3d at 970 (citing *U.S. ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027, 1033 (9th Cir. 1998)). The Ninth Circuit did not, as Mistick suggests, hold that a relator who causes a public disclosure, in any event, qualifies as an "original source."

Finally, Mistick's petition incorrectly asserts that the Third Circuit ignored, "that Mistick itself brought respondent's false statements to light through the Priselac FOIA request, and that the United States did not know those statements to be false until Mistick explained the circumstances . . .". Petition for Writ of Certiorari at 28. To the contrary, there is absolutely no evidence in the record that Mistick brought any "false statements" to light through its FOIA request or that it informed the United States of anything of which it was not previously aware.

In conclusion, Mistick has failed to identify a conflict among the Circuits or any other compelling reason as to why this Court should grant certiorari to review the Third Circuit's determination that Mistick was not an "original source" of the information upon which it based its complaint in this matter.

CONCLUSION

For all the foregoing reasons, Mistick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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